Supreme Court, U.S.
OCT 4 1999
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No. 99-458

IN THE

Supreme Court of the United States

DON VICENTE MACIAS, INC.,

Petitioner,

v.

TEXAS GULF TRAWLING COMPANY, INC.,
ZIMCO MARINE, INC. and
MARINE RAILWAY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition erroneously lists the name and address of the attorneys of record for the Respondents. The attorneys of record for the Respondents are Tom Fleming and J. Rolando Olvera, Jr. The name of the firm is Fleming & Olvera, P.C., 1650 Paredes Line Road, Suite 102, Brownsville, Texas 78521.

In addition, the petition incorrectly states the following as parties to the proceeding: Ciclon Negro, Inc.; Patricio Ahumada, Jr.; Antonio Villeda; RCA Trawlers Maintenance and Supply, Inc.; Walter Zimmermann; Harley Londrie; and Ed McAninch. The foregoing corporate entities and/or individuals were not parties to the case styled Don Vicente Macias, Inc. vs. Texas Gulf Trawling Company, Inc., et al, Adversary No. 95-2059-B, before the United States Bankruptcy Court for the Southern District of Texas, Brownsville Division.

The corporate Respondents are all subsidiaries of Texgulmarco, Inc. No publicly held company owns 10% or more of the stock of any Respondent.

STATEMENT OF THE CASE

The petition seeks this Court's review of the Fifth Circuit's opinion affirming the District Court's dismissal of an appeal from Bankruptcy Court. The facts are undisputed that the subject notice of appeal was not timely filed; however the Petitioner requests relief under the "unique circumstances doctrine". The subject Bankruptcy Court order was entered December 28, 1995. Pursuant to Rule 8002, Federal Rules of Bankruptcy Procedure, a notice of appeal must be filed within ten days, or alternatively, a motion for extension of time may be filed within twenty days of the expiration deadline, and granted upon a showing of excusable neglect. As admitted in the Petitioner's "Motion for Extension of Time to File Notice of Appeal", the Petitioner received the Bankruptcy Court order on January 2, 1996, well within the ten day notice period. The petitioner filed the motion for extension of time on January 25, 1996. The motion contains no showing of excusable neglect for the late filing as required by Rule 8002(b)(2), FRBP. In addition, there is no court order or instruction allowing for said late filing.

As detailed below, there is no basis for this Court's review because:

1. there is no showing of excusable neglect;

2. the "unique circumstances doctrine" does not apply; and

3. the petition for writ of certiorari does not meet the consideration requirements governing review as set forth in Rule 10, Rules of the Supreme Court of the United States.

A. The notice of appeal was not timely filed and there was no showing of excusable neglect.

As admitted in the petition, the subject Bankruptcy Court order was entered December 28, 1995. The deadline for filing a notice of appeal was January 7, 1996, and the Petitioner admits receiving the subject order on January 2, 1996, five days prior to the expiration of the notice deadline. (Petition Appendix p. a-43). The subsequent "Motion for Extension of Time to File Notice of Appeal" was filed January 25, 1996; said document is void of any explanation of excusable neglect as to why the notice of appeal could not have been filed within five days of receipt and within the requisite deadline. (Petition Appendix pp. a-42 - a-44). As evidenced by the language therein, the document fails to meet the specific requirements of Rule 8002, FRBP.

B. The "unique circumstances doctrine" is not applicable in the pending case.

The petition cites the Bankruptcy Court's dictum contained in the "Order Granting Motion for Extension of Time to File Notice of Appeal" (Petition Appendix pp. a-45 - a-46) as the basis for this Court granting writ of certiorari under the "unique circumstances doctrine". The petition cites *Thompson v. I.N.S.*, 375 U.S. 384 (1964) and *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), in support of its contention. However, the petition misapplies said doctrine. As stated in *Osterneck*, *Id.* at 179:

> By its terms, Thompson applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.

The order entered by the Bankruptcy Court in December 1995 contains no language whatsoever which would justify a reliance by Petitioner to fail to file a timely notice of appeal. As required in *Osterneck*, the filing of the notice of appeal was not "properly done". The order upon which the Petitioner alleges reliance was issued on January 26, 1996 (Petition Appendix pp. a-45 - a-46), after the violation of Rule 8002, FRBP. Thus, the "unique circumstances doctrine" is not applicable.

C. The petition fails to meet the requirements of Rule 10.

As stated in Rule 10, Rules of the Supreme Court of the United States:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

As referenced therein, the subject petition fails to present any meritorious constitutional and/or conflict of law issue. The basis for said petition is the alleged misapplication of Rule 8002, FRBP; a petition should not be granted pursuant to said issue.

D. The petition misrepresents the history of this case.

The first paragraph on page nine of the petition incorrectly refers to the consolidation by the Fifth Circuit of three debtor adversary proceedings; said statement is erroneous and misleading. As part of a Chapter 11 bankruptcy core proceeding styled in *In Re: Don Vicente Macias, Inc.*, Case No. 94-21339-

B-11, the Petitioner filed two adversary proceedings. In a separate bankruptcy core proceeding styled in *In Re: Ciclon Negro, Inc.*, Case No. 94-21338-B-11, the debtor therein filed two separate adversary proceedings alleging similar causes of action against the same creditors, Texas Gulf Trawling Company, Inc. Zimco Marine, Inc., and Marine Railway, Inc. The Bankruptcy Court consolidated all four adversaries and after a trial on the merits in September 1995, entered a final order December 28, 1995 which resolved all four existing adversary proceedings. (Petition Appendix pp. a-6 - a-12). Three of the four adversary proceedings which were appealed by the debtors were dismissed at the District Court level, with no subsequent appeal thereafter. The only adversary proceeding surviving on appeal is the one presently before this court styled Don Vicente Manias, Inc. vs. Texas Gulf Trawling Company, Inc., et al (Adversary No. 95-2059-B).

The two other appeals consolidated by the Fifth Circuit were those of Respondent Texas Gulf Trawling Company, Inc. Specifically, in each of the above referenced bankruptcy core proceedings, the respective debtors filed proof of claim objections to creditors Texas Gulf Trawling Company, Inc., Zimco Marine, Inc. and Marine Railway, Inc. After a proof of claim objection hearing in January 1995, the Bankruptcy Court entered an order in February 1995 approving the proof of claims of Zimco Marine, Inc. and Marine Railway, Inc., and took under advisement the proof of claim objection as to Texas Gulf Trawling Company, Inc. The February 1995 order constituted a final judgment in each respective core proceeding as to the proof of claims filed by Zimco Marine, Inc., and Marine Railway, Inc.; said order was never appealed by the respective debtor entities. In July 1995, the Bankruptcy Court issued a memorandum opinion affirming the proof of claim of Texas Gulf Trawling Company, Inc. in the amount of $300,000.

(Petition Appendix pp. a-21 - a-29). Said order constituted a final order in each core proceeding as to the proof of claim filed by Texas Gulf Trawling Company, Inc., and was appealed by Texas Gulf Trawling Company, Inc. to the District Court and subsequently the Fifth Circuit. The two appeals brought by Texas Gulf Trawling Company, Inc. were the two appeals consolidated before the Fifth Circuit with the above referenced Petitioner's adversary proceeding. (Petition Appendix pp. a-52 - a-55).

REASONS FOR DENYING THE WRIT

1. The Petitioner received the subject order five days prior to the expiration of the notice of appeal deadline; there is no showing whatsoever of any claim of excusable neglect as to why the Petitioner failed to file a notice of appeal within said five days.

2. The "unique circumstances doctrine" does not apply. The filing of the notice of appeal was not "properly done" by the Petitioner, and there is no instruction or order from the Bankruptcy Court allowing the Petitioner to file a late notice of appeal.

3. The petition fails to meet the constitutional and/or conflict of law considerations set forth in Rule 10, Rules of the Supreme Court of the United States; the basis of the petition is the alleged misapplication of Rule 8002, FRBP.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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